

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD DEEDS

Plaintiff,

vs.

ROBERT BARATS, *et al.*,

Defendants.

3:03-CV-0453-LRH (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

May 16, 2008

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment re: disciplinary claims (#355 and #361 (*in camera*)). Plaintiff opposed as to defendants Thorpe and Kennedy (#378) and defendants replied (#390).¹ Also before the court is plaintiff's motion for summary judgment against defendant Kennedy (#327). Defendants opposed (#365) and plaintiff replied (#396). Also before the court is plaintiff's motion for summary judgment against defendant Thorpe (#346), which defendants opposed (#375).² The court has thoroughly reviewed the record and the motions and recommends that defendants' motion for summary judgment re: disciplinary claims as to defendants Kennedy and Thorpe (#355) be granted in part and denied in part, and plaintiff's motions for summary judgment against defendant Kennedy (#327) and defendant Thorpe (#346) be denied.

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¹ Defendants' motion for summary judgment re: disciplinary claims involves plaintiff's claims against defendants Kennedy, Thorpe and Lamb (#355). Plaintiff filed two oppositions – one as to defendants Kennedy and Thorpe (#378), and one as defendant Lamb (#373). The court addressed plaintiff's claims against defendant Lamb in a separate report and recommendation (#414).

² Plaintiff's motion for summary judgment against defendant Thorpe also included a motion for summary judgment against defendant D'Amico, which the court addressed in a separate report and recommendation (#404).

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Richard T. Deeds (“plaintiff”), a *pro se* prisoner, is currently incarcerated in the custody of the Nevada Department of Corrections (“NDOC”) at the Northern Nevada Correctional Center (“NNCC”) (#250). Plaintiff brings his second amended complaint pursuant to 42 U.S.C. § 1983, alleging violations of his First, Fifth, Eighth, and Fourteenth Amendment rights, and his rights pursuant to the Americans with Disabilities Act (“ADA”). *Id.* Plaintiff names as defendants Robert Bayer, former NDOC Director; Jackie Crawford, former NDOC Director; Theodore D’Amico, NDOC Medical Director; Andrew Fras, NNCC Physician; Donald Helling, NNCC Warden; Chaplain Kelly, NNCC Chaplain; Keith Kennedy, NNCC Lieutenant; Janet Lamb, NNCC Correctional Nurse; Donald Thorpe, NNCC Correctional Officer; and Robert Barats, NNCC Correctional Officer. *Id.*

The parties’ motions for summary judgment pertain to counts nine and ten (#250).³ In count nine, plaintiff alleges that on January 15, 2002, defendant Kennedy “sentenced me to 45 days disciplinary detention, limited to 15 days by the U.S. Supreme Court, by calling it ‘Austere Housing,’ violating the 8th Amendment prohibition of the sanction.” *Id.* In count ten, plaintiff alleges that on January 7, 2002, defendant Thorpe violated his Fourteenth Amendment rights by issuing a false disciplinary charge against plaintiff to conceal the fact that he assaulted plaintiff. *Id.*

The Court notes that the plaintiff is proceeding *pro se*. “In civil rights cases where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

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³ In his second amended complaint, plaintiff did not set out formal “counts” (#250). Plaintiff sets out eleven claims in paragraph form. However, instead of numbering the paragraphs sequentially, plaintiff numbers his claims to correspond with numbers he assigned these claims in prior complaints. To avoid confusion, the court will refer to plaintiff’s claims in sequence, as counts one through eleven, beginning with plaintiff’s first paragraph.

II. DISCUSSION & ANALYSIS

A. Discussion

1. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual disputes exist. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court grants summary judgment if no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding whether to grant summary judgment, the court must view all evidence and any inferences arising from the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). In inmate cases, the courts must

[d]istinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities. Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

Beard v. Banks, 126 S.Ct. 2572, 2576 (2006). Where reasonable minds could differ on the material facts at issue, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The moving party bears the burden of informing the court of the basis for its motion, and submitting evidence which demonstrates the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

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1 **B. Analysis**

2 As the parties filed cross-motions for summary judgment, the court addresses all
3 arguments and evidence concurrently.

4 **1. Plaintiff's Claims**

5 Initially, the court must define the limits of the claims in plaintiff's complaint. Plaintiff
6 alleged certain constitutional claims against defendants Thorpe and Kennedy in his complaint,
7 but in his motions and oppositions, makes arguments concerning additional constitutional claims.
8 The defendants contend that plaintiff's arguments should be limited to the claims in his
9 complaint.

10 **a. Defendant Thorpe**

11 In his complaint, plaintiff alleges that defendant Thorpe violated his Fourteenth
12 Amendment "right to fairness" by issuing a false Notice of Charges ("NOC") on January 7, 2002,
13 to cover up the fact that he assaulted plaintiff (#250). Defendants question whether the "right to
14 fairness" is a cognizable constitutional claim (#355 and #390). Additionally, in his filings,
15 plaintiff makes a number of new allegations, asserting that defendant Thorpe "hunted" him for
16 six months, did not allow him to read, write or talk on the telephone, and sexually harassed him
17 and demanded sexual favors (#378, pp. 3-5, 19-20; #346). Plaintiff also claims that he filed
18 "many" complaints about defendant Thorpe, which Thorpe knew about when he issued the false
19 NOC. *Id.* Further, plaintiff alleges that defendant Thorpe physically harmed him during the
20 January 7 incident (#346, p. 25).⁴ In his filings, plaintiff cites to both First Amendment
21 retaliation law and Eighth Amendment excessive force law, seemingly arguing that the court
22 should grant him summary judgment on both (#346 and #378). Despite that fact that the court
23 must view *pro se* litigants' complaints liberally, and even giving the plaintiff the benefit of the
24 doubt, nowhere in his complaint has he alleged either a retaliation or excessive force claim

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26 ⁴ At the end of his motion for summary judgment, plaintiff even adds the new allegation that
27 defendant Thorpe tried to throw plaintiff down the metal stairs during the incident on January 7. *See* #346,
28 p. 27 ("He actually tried to throw me down those metal stairs. I figure I'll save that part for damages"); *see also* #378, pp. 11, -14. This allegation is entirely unsupported by any evidence.

1 against defendant Thorpe. *See* #250. Thus, the court disregards all allegations and evidence
2 plaintiff submits in an attempt to prove either of these constitutional violations. Considering
3 plaintiff's *pro se* status, the court construes plaintiff's claim against defendant Thorpe as an
4 allegation that defendant Thorpe violated plaintiff's Fourteenth Amendment due process rights
5 by issuing a false NOC.

6 **b. Defendant Kennedy**

7 In his amended complaint, plaintiff alleges that defendant Kennedy violated his Eighth
8 Amendment rights by sentencing him to forty-five days in disciplinary detention, but calling it
9 "austere housing" to get around limits on the amount of time prison officials may confine an
10 inmate to disciplinary detention (#250). Plaintiff does not mention the Fourteenth Amendment
11 in his amended complaint, but makes a number of Fourteenth Amendment arguments in his
12 motions. Defendants contend that plaintiff has failed to state a Fourteenth Amendment claim
13 (#355 and #365). Plaintiff claims that defendants have admitted that he stated a Fourteenth
14 Amendment claim against defendant Kennedy and should be estopped from arguing otherwise
15 (#378).

16 The court held a hearing on September 25, 2006 (#144). Plaintiff's complaint in effect
17 at that time alleged both Fourteenth and Eighth Amendment violations against defendant
18 Kennedy. *See* #3, p. 11, ¶¶ 17 and 19. During that hearing, defense counsel acknowledged that
19 plaintiff had properly alleged a Fourteenth Amendment claim against defendant Kennedy (#144).
20 Later in these proceedings, the court granted plaintiff leave to amend his complaint, although it
21 issued strict instructions as to the amendments plaintiff was permitted to make (#243). In his
22 amended complaint, plaintiff asserted only an Eighth Amendment claim against defendant
23 Kennedy (#250).

24 Defense counsel now asserts that her admission that plaintiff had stated a Fourteenth
25 Amendment claim against defendant Kennedy was in relation *only* to plaintiff's original
26 complaint and not plaintiff's amended complaint (#365). The court agrees that plaintiff's
27 amended complaint alleges only an Eighth Amendment claim against defendant Kennedy and the
28 court construes that claim as challenging the conditions of confinement in austere housing (#250,

p. 9). However, because plaintiff possibly misinterpreted what was required of him in amending his complaint based on the September 25, 2006 hearing (#144) and the March 20, 2007 hearing (#243), and because the plaintiff is acting *in pro se*, the court will give him the benefit of the doubt and will address both Eighth and Fourteenth Amendment claims against defendant Kennedy.⁵ However, although this court will address a Fourteenth Amendment due process claim against defendant Kennedy with regard to the procedures plaintiff received during his disciplinary hearing, it will not allow plaintiff to expand on the claims set out in his complaint.⁶

2. Fourteenth Amendment Due Process Claims Against Defendants Thorpe and Kennedy

Plaintiff claims that defendant Thorpe violated his due process rights when he issued plaintiff a false NOC. Plaintiff further claims that defendant Kennedy denied him due process during his disciplinary hearing because Kennedy had a conflict of interest, falsified plaintiff's statement, and denied plaintiff his right to call witnesses and present evidence.

Prisoners may not be deprived of liberty or property without due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). In *Wolff*, the Supreme Court held that prisoners must receive minimum due process rights when a liberty or property interest is at stake during a

⁵ This conclusion is appropriate because with relation to plaintiff's claim against defendant Thorpe, the court will be addressing defendant Kennedy's actions during the hearing anyway. This is because plaintiff's Fourteenth Amendment claims against defendants Thorpe and Kennedy essentially overlap each other. To resolve plaintiff's claim that defendant Thorpe issued a false NOC, the court must review whether plaintiff received due process with regard to the guilty finding; thus, the court must review defendant Kennedy's actions during the disciplinary hearing.

⁶ Plaintiff makes many legal arguments in his filings that are irrelevant to the claims in his complaint. For instance, in his motion for summary judgment against defendant Kennedy, plaintiff argues that NDOC created a liberty interest by promulgating Administrative Regulation ("AR") 733, which states that inmates in disciplinary segregation should be permitted to retain their personal property unless security requires otherwise (#327, pp. 5, 15). In support of this assertion, plaintiff cites case law which holds that states create liberty interests by including mandatory language within state statutes and prison regulations (#327 (citing *Walker v. Sumner*, 14 F.3d 1415 (9th Cir. 1994), *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), and *Hewitt v. Helms*, 459 U.S. 460 (1983))). First, plaintiff should take note that this "mandatory language" methodology was overruled in 1995. *Sandin v. Conner*, 515 U.S. 472, 484, n.5 (1995) (abandoning the approach set out in *Hewitt* and *Thompson*). Inmates no longer receive liberty interests merely from the inclusion of mandatory terms such as "shall" and "must" in the language of a regulation or rule. Second, a liberty interest claim is not within the realm of claims that plaintiff alleged in either his original or amended complaints.

1 disciplinary hearing. *Id.* at 556. However, “prison disciplinary proceedings are not part of a
2 criminal prosecution, and the full panoply of rights due a defendant in such proceeding does not
3 apply.” *Id.* The rights a prisoner receives during a prison disciplinary hearing must consist of a
4 “mutual accommodation between institutional needs and objectives and the provisions of the
5 Constitution.” *Id.* Thus, prisoners are entitled to advance written notice of the disciplinary
6 charges, an opportunity to call witnesses and present evidence if consistent with institutional
7 safety and correctional goals, and a written statement by the fact finder as to the evidence relied
8 upon and the reasons for the disciplinary action taken. *Serrano v. Francis*, 345 F.3d 1071, 1078
9 (9th Cir. 2003) (citing *Wolff*, 418 U.S. at 564-71). A disciplinary officer’s decision need be
10 supported only by “some evidence in the record.” *Superintendent v. Hill*, 472 U.S. 445, 454
11 (1985).

12 Nevada law provides that a conviction of a crime, by itself, does not work a forfeiture of
13 real or personal property. NRS 212.010(2). Defendants agree that plaintiff has a property interest
14 in his personal property (#365, p. 11). Thus, *Wolff* requires that plaintiff receive minimum due
15 process prior to being sentenced to forty-five days loss of his personal property and appliances.

16 The court has reviewed the parties’ evidence. The defendants’ incident reports and NOC
17 state that on January 7, 2002, correctional officer-in-training Neighbors observed plaintiff
18 standing at the front of a cell for an extended period of time (#355, Exhibits F, G and H).⁷
19 Neighbors then observed a small bag containing a brown substance, later identified to be instant
20 coffee, passed under the door to plaintiff from the cell occupants. Neighbors informed defendant
21 Thorpe. Defendant Thorpe proceeded toward the cell from the unit office and ordered plaintiff
22 to step back and leave the bag on the floor. Plaintiff failed to obey this order, instead, picking up
23 the bag and walking towards the stairs. Defendant Thorpe stopped part way up the stairs,
24 stretched his arms to each side, and again told plaintiff to stop and surrender the bag. Plaintiff
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26 ⁷ Defendant Thorpe wrote one incident report and correctional officer-in-training Neighbors wrote
27 the other. Plaintiff makes much out of the fact that Neighbors was an officer-in-training, claiming that
28 Neighbors wrote his report a certain way in order to get a good recommendation from defendant Thorpe.
There is no evidence of this and the court disregards this allegation.

1 refused, and used his chest to push past defendant Thorpe's outstretched arm and proceed down
2 the stairs. Defendant Thorpe ordered plaintiff to stop and surrender the bag approximately eight
3 more times; however, plaintiff ignored the orders and began to get "loud and argumentative."
4 The incident disrupted the unit to the extent that Neighbors instituted a lock-down of all inmates,
5 retrieved a twelve-gauge shotgun, and placed himself in the window of the unit office. At this
6 point, defendant Thorpe was able to place plaintiff in restraints by grabbing his arm and holding
7 him against a table. However, even after defendant Thorpe moved plaintiff – who was in
8 restraints by that time – to the unit office, plaintiff continued to disobey Thorpe's orders by
9 refusing to sit down in a chair. Plaintiff was also verbally argumentative and abusive. Thereafter,
10 plaintiff was taken to medical for examination.

11 On January 11, plaintiff was served with a copy of the NOC. *Id.*, Exhibit F, D-MSJ 18.
12 That same day, a preliminary hearing officer reviewed the NOC, and referred resolution of the
13 incident to the disciplinary committee. *Id.*, D-MSJ 20. Plaintiff did not make a statement to the
14 preliminary hearing officer, but indicated that at the future disciplinary hearing, he wanted to call
15 two witnesses – Officer Minegar and Associate Warden Coleman. *Id.*

16 Defendant Kennedy held the disciplinary hearing on January 15, 2002. *Id.*, D-MSJ 21-22.
17 Plaintiff attended the hearing and pled not guilty to all charges, one of which was a battery charge
18 for walking through defendant Thorpe's outstretched arm on the stairs. The sole witness was
19 Officer Neighbors, who testified that the incident did not rise to the level of a battery, but that he
20 had feared for Thorpe's safety to the extent that he retrieved a shotgun. The hearing report
21 contains plaintiff's statement, in which he admits that he possessed the bag of instant coffee. He
22 also stated "I was offended that [Thorpe] touched me and I walked through his arm on the stairs."
23 Defendant Kennedy found plaintiff guilty of three violations, although he downgraded the battery
24 from a major to a general violation based on Neighbors' testimony. Defendant Kennedy
25 sentenced plaintiff to forty-five days loss of personal property and appliances, and forty-five days
26 confinement in disciplinary segregation in the austere housing unit. In making his determination,
27 defendant Kennedy relied upon the NOC, plaintiff's statement, and Neighbors's testimony. There
28 is no indication that plaintiff asked or was actually permitted to submit evidence or call witnesses.

1 The court first finds that defendants met *Wolff's* advance notice and written disposition
2 requirements. The evidence reveals that plaintiff received advanced notice of the charges on
3 January 11, 2002 (#355, Exhibit F, D-MSJ 18-19). As to the written disposition requirement,
4 defendant Kennedy wrote in the hearing report that he relied on plaintiff's statement, the NOC,
5 and Neighbors's testimony in finding plaintiff guilty. *Id.* at D-MSJ 22.

6 However, genuine issues of material fact exist as to whether defendant Kennedy
7 impermissibly prohibited plaintiff from calling witnesses and presenting evidence in his defense.
8 As noted above, inmates have the right to present evidence and call witnesses during prison
9 disciplinary hearings. *Wolff*, 418 U.S. at 566. Yet, this is not an "unrestricted right" – the
10 requirement is limited to the discretion of the disciplinary officer, who must consider whether
11 doing so will be "unduly hazardous to institutional safety or correctional goals." *Id.* Prison
12 officials "must have the necessary discretion to keep the hearing within reasonable limits and to
13 refuse to call witnesses that may create a risk of reprisal or undermine authority... ." *Id.*
14 However, if a prison official limits an inmate's right to defend himself, he or she must have a
15 legitimate penological reason. *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992). Prison
16 officials must explain their reasons for denying inmates these due process rights, either at the time
17 of the hearing or "later," in court. *Id.* (citing *Ponte v. Real*, 471 U.S. 491, 497 (1985)). The
18 burden of proving an adequate justification for denial of the request rests with prison officials.
19 *Ponte*, 471 U.S. at 499. NDOC regulations also require that when a hearing officer denies an
20 inmate the right to call witnesses, the hearing officer must "document" his reasons (#355, Exhibit
21 O, D-MSJ 120).

22 Plaintiff claims that defendant Kennedy prohibited him from submitting documentary
23 evidence and calling two witnesses during his disciplinary hearing (#378). Plaintiff told the pre-
24 hearing officer on January 11 that he wanted to call Officer Minegar and Assistant Warden
25 Coleman as witnesses at his disciplinary hearing. *Id.* at D-MSJ 20. It is clear that this did not
26 occur. Further, although it is not entirely clear, there is some evidence demonstrating that
27 plaintiff asked but was not permitted to submit documents at the hearing (#378, Exhibit 10-D).
28 Unfortunately, the hearing record is completely devoid of information as to whether plaintiff

1 made these requests to defendant Kennedy on the day of the hearing. Plaintiff claims that he did.
 2 Defendant Kennedy has failed to present his version of events to this court, as is his burden.⁸ If
 3 plaintiff did indeed make these requests on the day of the hearing, and there was a valid reason
 4 for defendant Kennedy to have denied plaintiff's request, defendant Kennedy was *required* to
 5 document – either at the hearing or “later” – why he denied plaintiff his rights. *Ponte*, 471 U.S.
 6 at 497 (“[t]o hold that the Due Process Clause confers a circumscribed right on the inmate to call
 7 witnesses at a disciplinary hearing, and then conclude that no explanation need ever be vouched
 8 for the denial of that right, either in the disciplinary proceeding itself or if that proceeding be later
 9 challenged in court, would change an admittedly circumscribed right into a privilege conferred
 10 in the unreviewable discretion of the disciplinary board.”); *see also* NDOC Administrative
 11 Regulation 707 at #355, Exhibit O, D-MSJ 120 (“Such denial will be documented.”). Because
 12 there is an issue of fact as to whether plaintiff made the request, and if so, what defendant
 13 Kennedy's justifications were for denying plaintiff's request, the court cannot grant summary
 14 judgment.⁹

16 ⁸ Defense counsel contends that neither of plaintiff's witnesses are percipient witnesses to the
 17 January 7 incident (#365, p. 12). Defense counsel argues that “to the extent Deeds had earlier requested their
 18 participation as witnesses, their testimony would have had limited, if any, relevance to the disciplinary
 19 proceedings, and Defendant Kennedy was permitted to exclude such witnesses.” *Id.* While it is true that
 20 defendant Kennedy may permissibly exclude irrelevant witnesses, the justification for such exclusion must
 be documented at the hearing, or now, during the court case. *Ponte*, 471 U.S. at 497. As defense counsel
 was not present at the hearing, suppositions regarding why defendant Kennedy may have excluded plaintiff's
 witnesses is not enough to meet the *Ponte* requirement.

21 ⁹ The documentary evidence plaintiff wanted to submit consists of plaintiff's 2001 complaints
 22 regarding defendant Thorpe's behavior (#346, Exhibit S-1 – S-3). Review of these complaints do not
 23 indicate that plaintiff was concerned at that time with defendant Thorpe “stalking” him, “hunting” him, or
 24 requesting sexual favors, as he now alleges. Instead, the written complaints, which were sent to Assistant
 25 Warden Coleman, indicate to this court that plaintiff simply did not like or want to follow certain rules that
 26 defendant Thorpe was trying to enforce. *See* #346, Exhibit S-1 (plaintiff complains of “guards like c/o
 27 Thorpe who won't shut up, stay in their office, or mind their own business”); *see also id.*, Exhibit S-2
 28 (complaining about correctional officers using the cell speaker to “torture” him, stating “c/o Thorpe in
 particular, who uses any excuse to feel important”); *see also id.*, Exhibit S-3 (complaining that “For 8 hours
 a day, c/o Thorpe requires us to make him feel pretty, powerful, or relevant, using his authority in every little
 thing to make our lives revolve around him as he preens and prances. He won't stay out of my cell, won't
 stay out of my window, won't mind his own business or shut up. Constantly yells. Won't stay in his office.
 ... He fails entirely to understand he has to go away for anyone to like him. I probably won't pursue this
 further. He is his own punishment. But it's getting real old.”). Assistant Warden Coleman's response to

1 Plaintiff also claims that defendant Kennedy falsified his statement at the disciplinary
2 hearing. The written report of the hearing reveals that plaintiff admitted to possessing
3 contraband, and also admitted that he pushed past defendant Thorpe's arm because he was
4 "offended" that Thorpe touched him (#355, Exhibit F, D-MSJ 21). Plaintiff now contends that
5 he never said that he was "offended" by defendant Thorpe and therefore disregarded defendant
6 Thorpe's orders, and that the tape of the hearing will prove this (#378, p. 16). It is unclear why
7 neither party has submitted the tape of this disciplinary hearing – it seems to the court that some
8 of these issues could be resolved fairly quickly. If there is a tape available, it should have been
9 submitted as evidence in order to reveal what occurred during the disciplinary hearing with regard
10 to the witnesses and the evidence. The truth or falsity of plaintiff's statement on the day of the
11 hearing can be resolved at that time as well.

12 Finally, plaintiff claims that defendant Kennedy should not have run the disciplinary
13 hearing because he had a conflict of interest. Due process requires a non-biased decision maker
14 at the prison disciplinary hearing. *Wolff*, 418 U.S. at 570-71. Plaintiff alleges that a conflict was
15 created because in the months prior to the January 7 incident with defendant Thorpe, he
16 complained to defendant Kennedy about defendant Thorpe's behavior. Plaintiff also claims that
17 defendant Kennedy was defendant Thorpe's superior, but submits no evidence of this. While
18 there is evidence that plaintiff complained to Assistant Warden Coleman about defendant
19 Thorpe's behavior a few months prior to the incident, plaintiff presents no evidence that
20 defendant Kennedy knew about or was in charge of resolving these complaints. The court finds
21 no proof of any conflict.

22 Based on the above conclusions, the court denies both parties' motions for summary
23 judgment as to plaintiff's Fourteenth Amendment claims against defendants Thorpe and Kennedy
24

25 plaintiff states that part of a correctional officer's job is to be aware of what is going on in the unit and to
26 observe inmates, and that defendant Thorpe was doing what he was supposed to be doing. It is possible these
27 complaints could be read to demonstrate that defendant Thorpe had a dislike for plaintiff. It is equally
28 possible they are entirely irrelevant as to whether plaintiff possessed the coffee and ignored defendant
Thorpe's orders. Regardless, the court is constrained by the fact that defendant Kennedy failed to document
his justifications for denying plaintiff's request to submit evidence and present witnesses.

on the narrow issues of whether plaintiff was impermissibly prohibited from submitting evidence and calling witnesses and whether plaintiff's statement was falsified.¹⁰

2. Eighth Amendment Claim Against Defendant Kennedy

Plaintiff alleges in his complaint that there is a limit on the number of days an inmate may be confined to disciplinary detention, and that in order to bypass these time limits, defendant Kennedy sentenced him to disciplinary detention but called it "austere housing" (#250). Plaintiff also claims that austere housing is "indistinguishable" from disciplinary detention "in all salient respects" (#378, p. 19).¹¹

An inmate may challenge the conditions of his confinement as a violation of his Eighth Amendment right to be free from cruel and unusual punishment. To succeed on such a claim he must meet both an objective and subjective standard. *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To meet the objective standard, an inmate must prove that the deprivation he suffered was "objectively, sufficiently serious." *Morgan v. Morgenson*, 465 F.3d 1041, 1045 (9th Cir. 2006) (citations omitted). Prison officials must provide inmates with adequate shelter, food, clothing, sanitation, medical care, and personal safety. *Johnson*, 217 F.3d at 731. The court must evaluate the circumstances, nature and duration of the deprivation to determine whether it is inhumane or so egregious that it could result in significant injury or the unnecessary and wanton infliction of pain. *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002).

¹⁰ Plaintiff disputes defendant Thorpe's version of the January 7, 2002 incident, contending that he complied with defendant Thorpe's orders to drop the coffee and stop walking, and that defendant Thorpe physically hurt him. Defendant Kennedy, not defendant Thorpe, took the actions during plaintiff's disciplinary hearing. However, whether or not plaintiff received due process concerning the issuance of the allegedly false NOC is dependent on whether plaintiff received due process during his disciplinary hearing because the disciplinary hearing is where the factual basis for the guilty finding is resolved. Thus, the court does not dismiss plaintiff's Fourteenth Amendment claim against defendant Thorpe.

¹¹ Plaintiff also argues that austere housing constitutes an "atypical and significant hardship in relation to the ordinary incidents of prison life" (#327). As noted above, plaintiff alleged only an Eighth Amendment claim in his complaint; he did not allege that he had a liberty interest in remaining free from austere housing. Additionally, without actually conducting an analysis under *Sandin v. Conner*, 515 U.S. 472 (1995) – which would require the court to compare general population, austere housing, and disciplinary detention conditions – the court observes, as set out in further detail below, that from plaintiff's description of his conditions during his time in austere housing, austere housing is not nearly as restrictive as disciplinary detention.

1 The subjective standard requires a showing that prison officials were “deliberately
2 indifferent” to the inmate’s safety. *Johnson*, 217 F.3d at 731. Deliberate indifference requires
3 that prison officials were aware of facts that presented a substantial risk of harm to the inmate,
4 and recognized that the situation posed a substantial risk of harm. *Estate of Ford v. Ramirez-*
5 *Palmer*, 301 F.3d 1043, 1049-50 (9th Cir. 2002).

6 Plaintiff claims that during his sentence in austere housing, he was confined to his cell
7 nearly all the time, was prohibited from having a job and earning good-time credits, was denied
8 physical access to the law library, was denied cleaning supplies, was regularly “blasted” by the
9 loudspeaker in his cell, was denied his personal property and electrical appliances, was limited
10 to spending fifteen dollars per week in the canteen, that his cell lacked a window, and that guards
11 with shotguns patrolled the unit (#327, pp. 5-11; # 346).

12 Disciplinary segregation is defined as “a form of separation from the general population
13 in which an inmate’s privileges may be restricted” (#355, Exhibit O, D-MSJ 109). Disciplinary
14 segregation inmates can be confined to austere housing or disciplinary detention. *Id.* Austere
15 housing is defined as “a medium custody form of separation from the general population
16 administered by the disciplinary committee as an option for disciplinary sanctions.” *Id.*, Exhibit
17 L, D-MSJ 56. Disciplinary detention is defined as “a form of separation from the general
18 population, in which an inmate is confined to a single-occupancy cell, without privileges, for a
19 period not exceeding 15 days in any 30 day period.” *Id.*, Exhibit O, D-MSJ 109.

20 Austere housing inmates are housed in two-person cells and may: 1) possess limited
21 personal property such as clothing, personal hygiene supplies, legal and religious materials, three
22 personal books, writing materials, photo albums, and address books; 2) spend fifteen dollars per
23 week in the canteen; 3) have visitors one day per week; 4) access the law library through inmate
24 law clerks; and 5) are prohibited from working or possessing electrical appliances, musical
25 instruments, jewelry, hobby crafts and games (#355, Exhibit L, D-MSJ 56-68). The regulation
26 requires that inmates receive yard and tier time, although it is unclear how much. *Id.* at D-MSJ
27 59 (“The hours of operation for yard and tier access will be posted in Unit 7B. Ingress from the
28 yard will be permitted on the half hour. During yard and tier time, the cell door may remain

unlocked to complete showers and cell sanitation.”).¹² Correctional officers are permitted to terminate yard and/or tier time for the safety and security of the institution. *Id.* at D-MSJ 67.

In comparison, inmates in disciplinary detention are housed in single cells and may: 1) possess only clothing, personal hygiene supplies, and legal and religious materials; 2) receive only legal and first-class mail, but not packages, publications or newspapers; 3) receive only legal visits; 4) receive no personal or non-emergency phone calls; 5) request only five books at time from the law library; 6) are permitted only three showers per week; 7) are permitted exercise one hour per day, five days per week; and 8) may not use recreation equipment, watch television, make canteen purchases, or work a job (#355, Exhibit Q).

As a general matter, there is no indication that the conditions in austere housing, as set out in the NDOC regulations, violate the Eighth Amendment. Further, it is clear that disciplinary detention is much more restrictive than austere housing, and that the two are not “indistinguishable” as plaintiff claims.

Specifically, as to plaintiff’s forty-five day stay, only plaintiff’s claim that he was confined to his cell the entire time without yard or tier time is “objectively, sufficiently serious.” *Johnson*, 217 F.3d at 731; *see also Keenan v. Hall*, 83 F.3d 1083, 1089-90 (9th Cir. 1996) (deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation). Yet, aside from his affidavit, plaintiff has presented absolutely no evidence to support the allegation that he was confined to his cell the entire time he was in austere housing. Plaintiff did not present inmate affidavits, nor did he present grievances in which he complained of being confined to his cell. Plaintiff cannot create an issue of fact based merely on his unsupported allegation. *U.S. v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 492, n. 3 (9th Cir. 1990) (“Conclusory allegations unsupported by factual data will not create a triable issue of fact”) (citations and quotations omitted).

Plaintiff’s other claims regarding jobs, good-time credits, lack of physical access to the

¹² Defendants submit the housing rules for Unit 7B, which contain a Unit 7 yard and tier schedule (#355, Exhibit M, D-MSJ 80). However, this schedule states that it is not applicable to austere housing inmates; therefore, it is not helpful. *Id.* at D-MSJ 70 (“Unit 7B – not to include austere housing”).

1 law library, a cell window, armed guard patrols, personal property, appliances, and spending
2 limits do not rise to the level of objectively serious claims. The court notes that plaintiff spends
3 many pages making comparisons between the conditions in austere housing and general
4 population, implying a number of times that inmates confined to austere housing lack the same
5 privileges as inmates in general population (#327). This is true – inmates in austere housing *do*
6 receive less privileges because they are serving a sanction for failing to follow prison rules. The
7 court reminds plaintiff that he is in prison and that there is no constitutional requirement that
8 prison be pleasant. *See Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (“The constitution does
9 not mandate comfortable prisons...”). “To the extent that such conditions are restrictive and
10 even harsh, they are part of the penalty that criminal offenders pay for their offenses against
11 society.” *Id.* at 347. Clearly, prison officials must have a method of punishing inmates who
12 violate prison rules – indeed, order in a prison is essential. Thus, having different levels of
13 confinement with different levels of restrictions is a means by which officials can induce inmates
14 to obey the prison rules. It is perfectly acceptable for inmates, especially those in disciplinary
15 segregation, to be under stricter conditions of confinement, so long as they are provided with “the
16 minimal civilized measure of life’s necessities.” *Rhodes*, 452 U.S. at 347.

17 Finally, the court addresses a last concern. In an attempt to prove that the officers at
18 NNCC are “corrupt,” “lazy,” and “retaliatory,” plaintiff sets out the many times he has been
19 sentenced to austere housing over the years (#327, pp. 9-10). For the record, this court it is
20 extremely familiar with plaintiff as he is a frequent litigant. In the course of reviewing filings in
21 plaintiff’s many court cases, this court has seen evidence that spans numerous years and details
22 plaintiff’s many run-ins with different correctional officers, NDOC medical personnel, and
23 outside medical personnel. The court is aware that many of the NDOC and outside medical
24 personnel are afraid of plaintiff and refuse to treat him, although, the court understands that the
25 plaintiff disputes this. Plaintiff continually asserts that the disciplinary incidents with correctional
26 officers are the result of retaliation or rogue guards. It is difficult for the court to believe that
27 plaintiff is the innocent party in each and every one of these incidents, as he continually asserts.
28 Plaintiff must understand that he loses credibility with this court in making these continual

allegations. In this particular case, the court has reviewed plaintiff's disciplinary segregation evidence and concludes that the evidence demonstrates only that the plaintiff does not like prison rules and does not like following them.

III. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that:

1. Plaintiff has alleged a Fourteenth Amendment due process claim against defendant Thorpe with regard to the January 7, 2002 incident;
2. Plaintiff has alleged a Fourteenth Amendment due process claim against defendant Kennedy with regard to the January 15, 2002 hearing and an Eighth Amendment claim as to the conditions of confinement in austere housing;
3. There exist genuine issues of material fact as to whether defendant Kennedy improperly denied plaintiff his right to present evidence and call witnesses during plaintiff's January 15, 2002 disciplinary hearing; these issues of fact preclude summary judgment as to whether the defendants violated plaintiff's Fourteenth Amendment due process rights;
4. There is no evidence that austere housing violates the Eighth Amendment as a general matter;
5. Plaintiff's claim that he was denied outdoor exercise during his time confined to austere housing is unsupported; and
6. The remainder of plaintiff's allegations concerning the conditions during his time confined to austere housing do not rise to the level of "serious" deprivations.

As such, the court recommends that:

1. Defendants' motion for summary judgment re: disciplinary claims as to defendants Kennedy and Thorpe (#355) be **GRANTED** as to plaintiff's Eighth Amendment claim, but **DENIED** as to plaintiff's Fourteenth Amendment claims; and
2. Plaintiff's motions for summary judgment against defendant Kennedy (#327) and defendant Thorpe (#346) be **DENIED**.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within ten days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This report and recommendation is not an appealable order and any notice of appeal

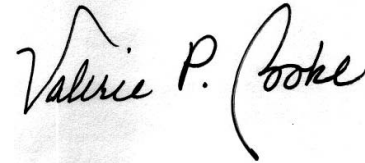
1 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
2 judgment.

3 **IV. RECOMMENDATION**

4 **IT IS THEREFORE RECOMMENDED** that:

- 5 1. Defendants' motion for summary judgment re: disciplinary claims as to defendants
6 Kennedy and Thorpe (#355) be **GRANTED** as to plaintiff's Eighth Amendment
7 claim, but **DENIED** as to plaintiff's Fourteenth Amendment claims; and
8 2. Plaintiff's motions for summary judgment against defendant Kennedy (#327) and
9 defendant Thorpe (#346) be **DENIED**.

10 **DATED:** May 16, 2008.



11 UNITED STATES MAGISTRATE JUDGE
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